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JAN 24 2019

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 18-CI-60027

FILED

JAN 2 2019

FRANKLIN CIRCUIT COURT
CLERK

COMMONWEALTH OF KENTUCKY
OFFICE OF THE SECRETARY OF STATE, *ex rel.*
ALISON LUNDERGAN GRIMES, in her official
capacity as Secretary of State of the Commonwealth
of Kentucky

PLAINTIFF

A. **COMPLAINT FOR A DECLARATION OF RIGHTS
PURSUANT TO KRS 418.040**

JARED DEARING

DEFENDANT

and

JENNIFER SCUTCHFIELD

DEFENDANT

**** * * * * *

Comes now the Plaintiff, the Commonwealth of Kentucky Office of the Secretary of State, *ex rel.* Alison Lundergan Grimes, in her official capacity as Secretary of State ("Plaintiff" or "the Office of the Secretary of State"), by and through counsel, and brings this action for a declaration of rights against Defendants, Jared Dearing ("Dearing") and Jennifer Scutchfield ("Scutchfield" and, together with Dearing, "Defendants").

NATURE OF ACTION

1. This is a complaint for a declaration of rights, governed by the Kentucky Declaratory Judgment Act, KRS 418.010, *et seq.* and Kentucky Rule of Civil Procedure 57.

2. KRS 418.040 provides this Court with authority to "make a binding declaration of rights, whether or not consequential relief is or could be asked" when a controversy exists.

3. Here, an actual and justiciable controversy exists with respect to the legal right of the Office of the Secretary of State to access Kentucky's Voter Registration System ("VRS")

because Defendants—who are, respectively, Executive Director and Assistant to the Executive Director of the Kentucky State Board of Elections (“SBE”)—have repeatedly advanced the legally erroneous position that the Office of the Secretary of State should be restricted from accessing the VRS.

4. Contrary to Defendants’ mistaken belief, the Office of the Secretary of State is legally entitled to access the VRS pursuant to federal and Kentucky law. Indeed, access is necessary to perform the duties imposed on the Secretary of State by federal and Kentucky law. The Secretary of State’s right to access the VRS has been reaffirmed by a *unanimous* resolution passed by the SBE. A consent decree entered into by the Secretary of State and the United States Department of Justice in *Judicial Watch, Inc. v. Alison Lundergan Grimes, et al.*, Case No. 3:17-cv-00094, U.S. District Court for the Eastern District of Kentucky, Frankfort Division, further affirms that, as the Commonwealth’s Chief Election Official, the Secretary of State is necessarily required to access Kentucky’s VRS.

5. Defendants’ erroneous position that the Office of the Secretary of State has acted inappropriately in accessing the VRS is inconsistent with both federal and Kentucky law, as well as the unanimous resolution of the SBE reaffirming the Secretary of State’s right to access the VRS. Defendants’ repeated incorrect comments have caused disharmony and confusion among the Office of the Secretary of State and the SBE, as well as the general public.

6. Accordingly, because of the importance of resolving this issue for both the current Secretary’s administration and future administrations, the Office of the Secretary of State seeks a declaration of rights that it is entitled as a matter of law to access the VRS.

PARTIES

7. Plaintiff is the Office of the Secretary of State of the Commonwealth of Kentucky. The Secretary of State is a Constitutional state officer, pursuant to Section 91 of Kentucky Constitution. Pursuant to KRS 117.015(2), the Secretary of State further serves as Chair of the SBE and the Chief Election Official of the Commonwealth of Kentucky.

8. Defendant Jared Dearing currently serves as the Executive Director of the SBE, appointed pursuant to KRS 117.025(1). Defendant Jennifer Scutchfield currently serves as Assistant to the Executive Director of the SBE pursuant to KRS 117.025(2), and is a lawyer for the Commonwealth of Kentucky by Executive Order of the Governor. The SBE is a state agency responsible for "administer[ing] the election laws of the state and supervis[ing] registration and purgation of voters within the state" pursuant to KRS 117.015, *et seq.* KRS 117.015(1). The SBE consists of the Secretary of State and six members appointed by the Governor pursuant to KRS 117.015(2). The SBE staff consists of an Executive Director, who is the "chief administrative officer for the board," an assistant "of a different political party than the director," and a bipartisan staff sufficient to carry out its duties. KRS 117.025(1) and (2).

JURISDICTION AND VENUE

9. An actual, justiciable controversy exists, and this Court has subject matter jurisdiction over this action pursuant to KRS 418.040 and KRS 23A.010.

10. Venue is appropriate in this Court pursuant to KRS 452.405 and 452.480, because this action generally relates to a controversy arising in Frankfort, Kentucky and the primary offices of the Defendants are located in Frankfort, Kentucky.

FACTUAL BACKGROUND

I. Allegations by Defendant Dearing.

11. On August 27, 2018, Defendant Dearing wrote a letter addressed to the members of the SBE (the "Letter"). A true and correct copy of the Letter is attached hereto as Exhibit 1.

12. Among various other factually unfounded and legally incorrect claims, Defendant Dearing asserted in the Letter that employees of the Office of the Secretary of State have improperly accessed the VRS system. Specifically, Defendant Dearing claims that the "Secretary of State (SOS) staff continue to have access to and use [VRS] for inappropriate reasons, which include, but may not be limited to, the use of VRS to look up potential SBE state employees during the interview process." Exhibit 1, at 1. Mr. Dearing further claims "[Secretary of State] staff (during my tenure) have looked up the voter registration and party affiliation information of current SBE staff and potential SBE staff during their interview process. These employees include both merit and contracted employees." *Id.*

13. The Letter makes clear that Defendant Dearing mistakenly believes that it is improper for the Secretary of State to have **any access** to the VRS database. Indeed, Mr. Dearing suggests that, *"neither former Secretary of State, Trey Grayson, nor his staff, had access to the voter registration database and yet Secretary Lundergan-Grimes has given herself this access and continually uses it for inappropriate reasons."* *Id.* (emphasis added).

14. Defendant Scutchfield has failed to correct the legal misinterpretations of Defendant Dearing and, to the contrary, has advised SBE staff in a manner inconsistent with the right of the Secretary of State to access the VRS. In the performance of their official duties, Defendants have maintained the legally erroneous position that the Office of the Secretary of State's access to the VRS should be restricted.

15. The allegations in the Letter related to the Secretary of State's access to the VRS are based upon Defendants' misapprehension of federal and Kentucky law regarding the Secretary of State's duties as the Commonwealth's Chief Election Official and Chair of the SBE.

II. The Secretary of State's Duties Under Federal and Kentucky Law Require Access to the VRS.

16. The Commonwealth of Kentucky is subject to the requirements of the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA").

17. The NVRA was enacted "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" while "ensur[ing] that accurate and current voter registration rolls are maintained."

18. Section 10 of the NVRA requires each state to designate a state officer as the Chief Election Official.

19. Pursuant to KRS 117.015, the Commonwealth of Kentucky has designated that the Secretary of State serve as the Chief Election Official for the Commonwealth and Chair of the SBE. KRS 117.015 contemplates that the Secretary of State and the SBE are interdependent. For example, SBE budget requirements are attached to the Secretary of State's office.

20. The Secretary of State, as Chief Election Official and Chair of the SBE, is charged with ensuring Kentucky's compliance with the NVRA, HAVA, the Voting Rights Act of 1965 ("VRA"), the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), and the Military and Overseas Voters Empowerment Act of 2009 ("MOVE").

21. Pursuant to KRS 118.105, *et seq.*, the Secretary of State, as Chief Election Official and Chair of the SBE, receives statements of candidacy and nominating petitions, candidate withdrawals, and certifies names of candidates for placement on the ballot.

22. Pursuant to KRS 118.425(4), the Secretary of State, as Chief Election Official, receives certifications of official vote totals after each election.

23. The Secretary of State as Chief Election Official and Chair of the SBE, after each federal election cycle, certifies to the Election Administration Commission ("EAC"), Kentucky voter registration statistics, voter turnout, and compliance with federal law.

24. Additionally, pursuant to KRS 116.112 and the NVRA, the SBE performs regular maintenance of the VRS, including purges of voters who have died, been declared incompetent, and been convicted of a felony offense under KRS 116.113.

25. Accordingly, consistent with the office's obligations under federal and Kentucky law, the Secretary of State as Chief Election Official is required to utilize the VRS before, on, and after each election day and throughout the regular course of business to coordinate election inquiries and field complaints. To comply with these obligations, the Office of the Secretary of State has obtained a read-only copy of the VRS, which is regularly updated by SBE.

26. Section 303(a)(1) of the HAVA requires that "*each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State . . .*" (emphasis added). The statute continues, "*Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.*" *Id.* at Section 303(a)(1)(v) (emphasis added).

27. Prior to Secretary Grimes' tenure as Secretary of State, the VRS existed only in a mainframe version, which as a technical matter, could not grant multiple user access. The current iteration of the VRS software, which is technically capable of providing multiple user access, as required by HAVA, was created during Secretary Grimes' tenure in order to comply with HAVA.

28. Indeed, federal and Kentucky law *expressly provide* the Secretary of State with access to Kentucky's VRS in order to fulfill the Secretary's duties as Chair of SBE and Chief Election Official for the Commonwealth pursuant to the NVRA, UOCAVA, HAVA, MOVE, and Kentucky statutes.

III. The State Board of Elections Expressly Reaffirms The Secretary of State's Right to Access the VRS.

29. The day after Defendant Dearing's publication of his Letter, the SBE reaffirmed the Secretary of State's role as Kentucky's Chief Election Official, which expressly requires the Secretary to have access to the VRS.

30. Specifically, on August 28, 2018, The Commonwealth of Kentucky State Board of Elections voted to approve a *Resolution Affirming Kentucky State Board of Elections Staffing and Oversight* (the "SBE Resolution"). A true and correct copy of the SBE Resolution is attached hereto as Exhibit 2.

31. The SBE Resolution recites the Secretary of State's duties and obligations as Kentucky's Chief Election Official under federal and Kentucky law set forth above. The SBE Resolution also expressly reaffirms as follows:

[. . .] WHEREAS, *the Secretary of State as Chief Election Official utilizes State Board of Elections' systems, specifically the Voter Registration System, up to, on, and after each election and throughout the regular course of business, to coordinate election inquiries and field complaints;*

NOW, THEREFORE, be it resolved the Board of Elections of the Commonwealth of Kentucky reaffirm expressly:

Section 1. That the Secretary of State, Chief Election Official and Chair of the Kentucky State Board of Elections, to carry out the Board's statutory obligations and responsibilities in elections, *is necessarily charged with the day-to-day oversight of regular operations of the Kentucky State Board of Elections and its staff, including the Executive Director* and the Assistant to the Executive Director, who serve at the pleasure of the Board.

Section 2. That the Secretary of State, Chief Election Official, and Chair of the Kentucky State Board of Elections, to carry out the Board's statutory obligations and responsibilities in elections, *is necessarily required to have access to information in order to carry out and fulfill the aforementioned state and federal statutory obligations.*

Section 3. The Executive Director is directed to timely and fully communicate to the Chair and the Kentucky State Board of Elections matters that the Executive Director seems of importance to the purview of the Board in the thoughtful execution of the Board's statutory mission to oversee the fair administration of the election process.

(emphasis added).

32. Accordingly, the bipartisan members of the SBE have expressly reaffirmed the Secretary of State's right to access the VRS pursuant to both federal and Kentucky law.

IV. The U.S. Department of Justice Affirms The Secretary of State's Role as Kentucky's Chief Election Official and Responsibility for Kentucky's Compliance With the NVRA, Which Necessarily Requires Access to Kentucky's VRS.

33. The United States Department of Justice also affirmed the Secretary of State's right to access the VRS in the matter of *Judicial Watch, Inc. v. Alison Lundergan Grimes, et al.*, Case No. 3:17-cv-00094, in the U.S. District Court for the Eastern District of Kentucky, Frankfort Division (the "NVRA Lawsuit").

34. On November 14, 2017, Judicial Watch, a not-for-profit organization that files lawsuits “to enforce compliance with federal and state laws concerning the provision of records, public integrity, government accountability, and voting rights,” filed the NVRA Lawsuit against the Commonwealth of Kentucky, the Secretary of State, and the then-interim Executive Director and the individual members of the SBE.

35. On June 12, 2018, with the agreement of the Secretary of State, the United States Department of Justice intervened as a party to the NVRA Lawsuit on behalf of the federal government.

36. On July 3, 2018, Judicial Watch, the United States Department of Justice, and the Secretary of State agreed to enter a Consent Decree (the “Consent Decree”). A true and correct copy of the Consent Decree is attached hereto as Exhibit 3. The Secretary of State’s agreement to the Consent Decree greatly expedited the resolution of the case which otherwise would have been mired in discovery and litigation for months or years.

37. Among other provisions, the Consent Decree affirms that the Secretary of State is the Chief Election Official of Kentucky, and therefore is responsible for Kentucky’s compliance with the NVRA.

38. Specifically, the Consent Decree states:

The Commonwealth of Kentucky, through its State Board of Elections, is responsible for administering Kentucky’s election laws and supervising the registration and purging of registrants within the State. KRS § 117.015(1). The Secretary of State is the *ex officio* chair of the Kentucky State Board of Elections and Kentucky’s chief State election official, and is responsible for coordinating the State’s responsibilities under the NVRA. See 52 U.S.C. § 20509; KRS § 117.015(2).

39. As Kentucky's Chief Election Official responsible for Kentucky's compliance with the NVRA, the Secretary of State is necessarily required to have access to the VRS in order to carry out and fulfill the aforementioned state and federal statutory obligations.

V. Defendant Dearing's Allegations Are Erroneous As A Matter of Law.

40. Defendant Dearing alleges in his Letter that the Office of the Secretary of State improperly accessed the VRS to determine the party affiliation of a job candidate.

41. Notwithstanding that Dearing's allegation is factually inaccurate, the allegation is unsound as a matter of law. It would be proper for the Office of the Secretary of State to access VRS data to ensure that SBE staff are hired on a bipartisan basis, as required by Kentucky law.

42. Pursuant to KRS 117.025(2), SBE is required to "employ, on a *bipartisan basis*, a staff sufficient to carry out the duties assigned to the board, including legal counsel and a training officer to provide assistance to the county clerks and the county boards of elections in their training of precinct election officers." (emphasis added).

43. Consistent with this requirement, the SBE and the Office of the Secretary of State would be permitted to consider an applicant's party affiliation to ensure that the SBE staff are hired on a "bipartisan basis."

CLAIMS

Count I

Declaratory Judgment Pursuant to KRS 418.040

44. Plaintiff incorporates by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

45. There exists an actual and justiciable controversy with respect to the legal right of the Office of the Secretary of State to access Kentucky's VRS and to maintain a read-only copy of the VRS.

46. The Secretary of State, as Chief Election Official and Chair of the SBE, is entitled to access the VRS in order to fulfill statutory obligations imposed on the Secretary of State pursuant to federal and state law.

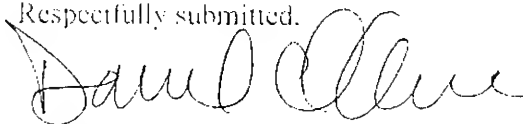
47. Defendants continue to advance publicly the erroneous position that the Secretary of State's access to the VRS should be restricted, giving rise to a justiciable controversy.

48. The Office of the Secretary of State is entitled to a declaration of rights that in the performance of official duties as the Commonwealth's Chief Election Official and Chair of the SBE, the Office of the Secretary of State is entitled as a matter of law to access the VRS and to maintain a read-only copy of the VRS.

WHEREFORE, Plaintiff, the Office of the Secretary of State, respectfully requests that the Court:

1. Enter an order declaring that the Office of the Secretary of State, as the Commonwealth's Chief Election Official and Chair of the SBE, is entitled as a matter of law to access the VRS and to maintain a read-only copy of the VRS in the performance of the office's official duties.
2. Docket this matter for early hearing pursuant to KRS 418.050.
3. Grant the Office of the Secretary of State any and all other relief to which it may be entitled.

Respectfully submitted,



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